

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.**

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

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Amendment of Section 73.202(b),	)	MM Docket No. 96-171
Table of Allotments,	)	RM-8846
FM Broadcast Stations	)	RM-9145
(Indian Springs, Nevada, Mountain	)	
Pass, California, Kingman, Arizona,	)	
and St. George, Utah)	)	

To: Chief, Mass Media Bureau

**FURTHER COMMENTS**

KHWY, Inc. ("KHWY"), the licensee of Station KHYZ(FM), Channel 258B, Mountain Pass, California, hereby submits these further comments in the above-captioned proceeding. 1/ The Allocations Branch issued a *Report and Order*, DA 98-689 (released April 17, 1998) ("R&O") in this matter, which was thereafter rescinded. *See Order*, DA 98-1001 (released May 27, 1998). The Order stated that a revised Report and Order in this proceeding will be issued. At this time, the record bears correction insofar as the rescinded R&O misstated KHYZ(FM)'s authorized service area, and therefore did not fully protect that service area from operation of Station KPXC(FM) on Channel 257C at Indian Springs, California. *See R&O* at ¶ 15. With this correction in mind, any reissued R&O in

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1/ KHWY is submitting concurrently a Motion for Leave to File these Further Comments. As indicated therein, these comments do not address any matters other than the authorized power of KHYZ(FM). Our other pleadings stand as previously filed.

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this proceeding must afford KHYZ(FM)'s intentionally authorized superpower contour complete interference protection.

### INTRODUCTION

In the rescinded R&O, the Allocations Branch -- citing incorrect *dicta* -- failed to protect the specifically authorized superpower operations of Station KHYZ. As discussed below, the Commission expressly authorized KHYZ to operate at power in excess of the standard Grade B maximum in order to provide specialized service to travelers on Interstate 15 in the Mojave Desert. KHWY has relied directly upon that authority in building its desert-based operations over the past 15 years. The rescinded R&O overlooked the prior Commission decisions regarding KHYZ when it failed to protect KHYZ's authorized contour, as well as Commission policy, as set forth in the *Las Piedras* decision, of protecting the integrity of contours authorized -- as here -- by specific waiver.

Not protecting the specifically-authorized contours of KHYZ from new interference would render a nullity the Commission's establishment of KHYZ as a superpower station. The Allocations Branch has the opportunity when it issues a revised R&O in this proceeding to respect the waiver of the class B maximums intentionally granted to KHYZ so it could fulfill a unique public interest function. Thus, any action taken in this proceeding must afford KHYZ full interference protection for its authorized contour.

## HISTORICAL CONTEXT

Unfortunately, few of the key Bureau staff responsible for the ground-breaking authorization of KHWY's radio service to the travelers along Interstate 15 through the harsh Mojave Desert are still in active service at the Commission. Yet memories are not the only historical resource here -- the public record documents the Commission's intentional authorization of above-Class B maximum power to KHYZ as a means to ensure continuous access by these travelers to a radio voice in the wilderness. Failure at this juncture to protect KHYZ's intentionally-granted contour (as opposed to grandfathered superpower stations operating in excess of the class maximums because they were authorized prior to the adoption of these maximums) would unravel the Bureau's exquisite and since-validated plan for cross-desert communications service by KHWY.

KHYZ (formerly KXVR) is a unique station. It, and its sister station, KRXV(FM), Yermo, California, were conceived to provide service to the unserved travelers through the Mojave Desert. *See Yermo and Mountain Pass, CA*, 45 RR2d 58, 59 [¶ 5] (Broadcast Bureau 1979). From the outset, the key purpose of the stations was to provide programming -- particularly weather and highway safety notices -- to a 150-mile stretch of Interstate Highway 15 (between Barstow, California and Las Vegas, Nevada). *Id.* The Bureau recognized this unique unserved need, and consequently assigned Class B allotments (reserved for wide-area coverage) so that the widest area of Interstate 15 would be served. *Id.* at 60 [¶ 9]. The Bureau was so concerned that the travelers be served that it expressly

conditioned the assignments on the use of maximum facilities. *Id.* at 61 [¶ 10].

Moreover, the allotment order addressed the fact that, even with maximum facilities on both channels, a 15-mile segment of Interstate 15 would not be provided 60 dBu service. The Bureau found comfort, however, in the fact that "in the absence of interference from other stations, as is the case here" a minimum of service from the Mountain Pass and Yermo stations would reach that segment. *Id.* at 60 n.7.

Thereafter, KHWY applied for and received a waiver of the Commission's rules to increase the effective radiated power of KHYZ further from 2.29 kilowatts to 10 kilowatts, in excess of the normal Class B maximum. *See* FCC File No. BPH-820714AB (granted May 22, 1985). The public interest justifications for the waiver included the showing that with the expanded service area, KHYZ would provide several segments of the highway with either the only aural service, or the only aural service serving the travelers on Interstate 15. Moreover, the waiver was justified because the Bureau's hope in the allotment order (that a minimum of service would reach the central segment of the highway) proved too optimistic due to terrain shielding. Following the Commission's grant of the waiver, KHYZ began expanded service. Although in the intervening years the Commission has authorized several stations in the Mojave Desert, none -- other than KHYZ/KRXV -- provide the essential continuum of service to the Interstate 15 travelers through this harsh environment.

The Commission again acknowledged the special safety role of KHWY's Mountain Pass and Yermo stations when it granted a main studio waiver in 1992 to co-owned station KHWY(FM), Essex, California, which serves travelers along Interstate 40, the desert highway to the south of Interstate 15. See FCC File No. BMPH-920312IE (granted October 2, 1992). The Chief of the Audio Services Division noted in the KHWY waiver grant (reference number 1800B3-ACS) that "[t]he Commission granted main studio waivers to Stations KRXV and KHYZ partly because they provide a unique advisory service to travelers on Interstate 15 through the Mojave Desert, and this will be the third such waiver for that purpose." 2/

As evidence of the continued critical public safety role of these stations, the California and Nevada Highway Departments have placed signs along Interstate 15 instructing motorists to tune to KHYZ on 99.5 and KRXV on 98.1 for emergency, highway and weather information. No other radio service provides this continuum of reception or the 24-hour local news, weather and safety updates to the Mojave Desert travelers. Traffic on Interstate 15 has doubled since 1984, so that at present more than one million travelers per week drive through KHWY's stations' coverage area. Thus, the mandate for superpower service by KHYZ is more essential than ever.

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2/ The Commission had granted in the original construction permits for Mountain Pass and Yermo a waiver of the main studio rule to allow co-location of the studios. When the original single main studio in Daggett, California, proved too removed from the California Highway Patrol, San Bernardino County Sheriff and California Department of Transportation offices in Barstow, California, the Commission in 1984 granted another waiver of the main studio rule to relocate the combined main studio to Barstow. See FCC File No. BMPH-840713AE.

In sum, the Commission's affirmative authorization extending KHYZ's protected service area is completely inapposite to those situations where stations happened to be operating at higher power when the current class restrictions were adopted. KHYZ is a superpower station, but it is not a grandfathered station.

**AS AN INTENTIONALLY AUTHORIZED SUPERPOWER STATION,  
UNLIKE GRANDFATHERED STATIONS, KHYZ'S AUTHORIZED  
FACILITIES MUST BE PROTECTED FROM INTERFERENCE**

The rescinded R&O's failure to specify that KHYZ's authorized facilities must be protected by KPXC's proposed operation on Channel 257C is only understandable in light of the Branch's reliance on misinformed *dicta* in a previous Allocations Branch decision, *Ludlow, California*, 10 FCC Rcd 563 (Allocations Division, 1995). <sup>3/</sup> In *dicta*, the Allocations Division's *Report and Order* in *Ludlow* characterized KHYZ as a "grandfathered" superpower station. See *Ludlow, California*, 10 FCC Rcd at 563 n.5. KHWY did not and does not dispute the Allocations Division's conclusion in *Ludlow* that "grandfathered" superpower stations are not due protection above the maximum Class B limits set forth in Section 73.211 of the Commission's Rules. <sup>4/</sup> But, as set forth above, KHYZ is not a

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<sup>3/</sup> In the *Ludlow* proceeding, while KHWY noted that certain sites for a Channel 261B operation at Ludlow might have the potential of causing interference to KHYZ, it did not object to the allotment of Channel 261B1 at Ludlow on that ground.

<sup>4/</sup> Because the status of KHYZ was not of decisional importance in *Ludlow*, KHWY did not file a petition for reconsideration in that proceeding. It did file however, on February 13, 1995, a "Request for Association with Record" to provide in the record a correction of KHYZ's status.

grandfathered superpower station. Instead, it is an intentionally-authorized superpower facility.

The distinction between grandfathered stations as opposed to stations, such as KHYZ, operating pursuant to waivers has been stressed by the Commission before. For example, in *Las Piedras, Puerto Rico*, 87 FCC 2d 1011 (1981), the Commission affirmed the decision not to change the allotment of Station WZAR(FM), Ponce, Puerto Rico, when the new allotment would meet the minimum distance separation rule, but would in fact impinge on the service areas of WZAR and WIAC-FM, San Juan, Puerto Rico. *Id.* at 1014. WZAR and WIAC were already short-spaced to each other, pursuant not to grandfathering, but due to short-spacing waivers that were justified by public interest benefits. *Id.* at 1013-14. The Commission held that the generally applicable minimum separation rule “was rendered inapplicable” by the Commission’s decisions to grant waivers of that rule. *Id.* at 1014. Applying only the theoretical protections of the minimum spacing rule when the Commission had granted intentional waivers, according to the Commission, “produces an incongruous result” which would be at odds with its decision to waive the rules for public interest reasons. *Id.* Consequently, the Commission refused to abide by the general protection standards when it would undermine intentionally granted waivers.

Here, KHWY is requesting consistent application of the principal set forth in *Las Piedras* -- that subsequent allocation decisions not undermine intentionally granted waivers of the spacing/maximum power rules.

## CONCLUSION

The Commission should not giveth with one hand and taketh with another. The Commission intentionally granted KHYZ superpower status to serve the public interest. KHWY has relied on that grant in building its operations along Interstate 15. The Commission must continue to respect its prior action by affording KHYZ actual contour protection from any new facilities. Assuming the Commission intends to reissue the R&O with substantially the same outcome, 5/ then at a minimum the R&O must be revised to provide that current and future applications for operation on Channel 257C at Indian Springs, California, must protect KHYZ's authorized service contours. With that revision, the integrity of the Bureau's waiver action would be preserved.

Respectfully submitted,

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June 29, 1998

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5/ As noted previously, KHWY is not addressing matters here other than the significance of its waiver authorization for superpower operations.



## **CERTIFICATE OF SERVICE**

I, Janine L. Jeter, hereby certify that a copy of the foregoing "Further Comments" has been served by first class mail this 29th day of June, 1998 on the following:

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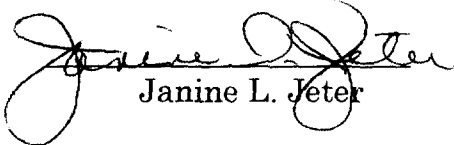
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